IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 28TH JUNE 2007 / 7TH ASHADHA 1929

SA.No. 265 of 1994(F)

(AGAINST THE JUDGMENT AND DECREE DATED 19/06/1993 MADE IN AS.60/1989 ON THE FILE OF THE COURT OF THE DISTRICT JUDGE OF KOLLAM, WHICH APPEAL WAS AGAINST THE JUDGMENT AND DECREE DATED 22/12/1988 MADE IN OS.179/1985 ON THE FILE OF THE COURT OF THE MUNSIFF OF KARUNAGAPPALLY)

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APPELLANTS:RESPONDENTS:PLAINTIFFS:

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1. **SAROJINI AMMA, RESIDING AT SINDUVIL (PUTHUVILA VADAKKE PUTHEN VEEDU) NADUVATHU CHERRY MURI, PANMANA VILLAGE.**

2. **RADHAKRISHNA PILLAI, RESIDING AT SINDUVIL (PUTHUVILA VADAKKE PUTHEN VEEDU) NADUVATHU CHERRY MURI, PANMANA VILLAGE.**

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON

RESPONDENTS: APPELLANTS:DEFENDANTS:

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1. **SANTHAMMA, RESIDING AT MUNDANTHARA VEEDU, NADUVATHU CHERRY, PANMANA VILLAGE.**

2. **G.CHELLAPPAN PILLAI, RESIDING AT MUNDANTHARA VEEDU, NADUVATHU CHERRY, PANMANA VILLAGE.**

BY ADV. SRI.P.B.SURESH KUMAR(QUILON) for R1 & R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.265 OF 1994

Dated 28th June 2007

J U D G M E N T

Plaintiffs in O.S.179 of 1985 on the file of Munsiff court, Karunagappally are the appellants. Respondents are the defendants. Appellants instituted the suit seeking a decree for fixation of boundaries of plaint A schedule property and also for declaration of right of easement by prescription for lateral support and for mandatory and prohibitory injunction. Plaint A schedule properties are three items of properties comprised in survey No.11293, 11323 and 11320 of Panmana village of Karunagappally Taluk. Plaint B schedule properties are two items of properties in survey No.11318 and 11319 of same village which are adjacent properties. Plaint A schedule property belongs to the appellants and plaint B schedule property to respondents. Item No.1 of plaint A schedule property lies to south of item No.1 of plaint B schedule property. Item No.2 of plaint A schedule property lies to north of item No.2 of plaint

B schedule property. Item No.3 of plaint B schedule property lies to east of item No.2 of plaint B schedule property. Suit was filed contending that respondents have excavated soil from portion of item No.2 of plaint B schedule property and obliterated the boundary and annexed a portion of item No.3 of plaint A schedule property to plaint B schedule property and therefore they are entitled to get a decree for fixation of boundaries and also a decree for mandatory injunction for construction of boundary wall and for declaration of right of easement of lateral support on the allegation that by removal of soil from the B schedule property which lies immediately to west of item No.3 of plaint A schedule property, its lateral support has been lost. Respondents filed a written statement contending that they are not aware of the exact re-survey boundary and the remedy of the appellants is to seek appropriate order under the Survey Boundaries Act. It was also contended that even before appellants purchased item No.3 of plaint A schedule property, present boundary was existing and respondents have been in possession of the property and therefore appellants are not entitled to get boundaries fixed or recovery of possession. It was further contended that even if any portion of the property is in their possession, right and title of the appellants

is barred by adverse possession and limitation. Respondents also contended that by excavation of the soil, lateral support of the plaint schedule properties were not lost and appellants are not entitled to a declaration of easement right by prescription. Learned Munsiff appointed a commission and Commissioner who was examined as PW4, submitted that Ext.C1(a) report and C1 (b) plan demarcating the plaint A and B schedule properties. On the evidence of Pws.1 to 4, Dws.1 and 2, Exts.A1 to A4 and C1 to C1(b) learned Munsiff found that Commissioner has correctly demarcated plaint A and B schedule properties in Ext.C1(b) plan. Learned Munsiff also found that western boundary of item No.3 of plaint B schedule property, which is the eastern boundary of item No.2 of plaint B schedule property is the re-survey boundary line as demarcated by the Commissioner in Ext.C1 (b) plan. Learned Munsiff also found 0.513 sq.links of plaint A schedule property is now in the possession of respondents and appellants have title to that property and while fixing boundary appellants are entitled to recover of possession of said portion of plaint A schedule property. Though respondents contended that title of the appellants is barred by adverse possession and limitation, trial court on the evidence found that that plea is not

sustainable and granted a decree for fixation of the boundary and recovery of possession. Learned Munsiff also found that by excavation of soil from item No.2 of plaint B schedule property, lateral support available to item No.3 of plaint A schedule property was lost and granted a decree for declaration of right of easement of lateral support and mandatory injunction. Suit was decreed. Defendants challenged the decree and judgment before District court, Kollam in A.S.60 of 1989. Learned Additional District Judge on re-appreciation of evidence confirmed the findings of learned Munsiff that plaint A and B schedule properties are correctly identified and demarcated in Ext.C1(b) plan. Learned Additional District Judge also upheld the finding of learned Munsiff on the easement right of lateral support available to plaint A schedule property and confirmed the decree and injunction. But decree for fixation of boundary was modified holding that existing boundary which lies further to the east of western re-survey boundary line of item No.3 of plaint A schedule property and item No.2 of plant B schedule property is the boundary line. Learned District Judge further held that the said boundary was treated as the boundary by the parties and therefore appellants are not entitled to a decree for recovery of possession or

fixation of boundary through the west of that boundary. Learned District Judge therefore modified the decree granted by the trial court to that extent. Plaintiffs are challenging the said decree and judgment in this second appeal.

2. Second appeal was admitted formulating following substantial questions of law.

> 1) Whether first appellate court was correct in reversing the decree of the trial court on fixation of the boundary demarcating item No.2 of plaint B schedule property and item No.3 of plaint A schedule property.
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> 2) When the report and plan submitted by the commissioner indicating the extent and identity of the property belonging to plaintiffs and lying beyond the original boundary, was the first appellate court justified in interfering with the decree.

3. Dispute in the second appeal is only in respect of 0.513 sq.links of land which lies in between the admitted properties of appellants and respondent. Dispute between the parties with regard to other aspects have already been finalised by the decree of the trial court which was confirmed by the first appellate court and not challenged thereafter. Item No.3 of plaint A schedule

property lies immediately to the east of item No.2 of plaint B schedule property. Even in the written statement respondents admitted that the separating boundary between the properties is the re-survey boundary line. Though it was contended that a physical boundary is existing between the properties, even when appellants purchased plaint A schedule property from the previous owner, learned Munsiff and learned Additional District Judge on appreciation of evidence found that actual separating boundary between item No.3 of plaint A schedule property which lies to east and item No.2 of plaint B schedule property which lies to the west is the re-survey boundary line separating the two properties. Item No.3 of plaint A schedule property is in survey No.11320. Item No.3 of plaint B schedule property is in survey No.11319. If re-survey boundary is to be treated as the separating boundary line, then disputed 0.513 sq.links of land which forms part of survey No.11320, belongs to appellants and respondents have no title to the property. Learned Munsiff on the evidence found that the said property forms part of survey No.11320 and appellants have title to the property. First appellate court also did not interfere with that finding. First appellate court only held that even though appellants have title to that property, respondents have been in

possession of the property for more than 12 years and so they have perfected the title by adverse possession. Therefore, the only question is whether the findings of first appellate court on the question of adverse possession is legal and correct.

4. When the suit is for recovery of possession on the strength of title, under Article 64 of Limitation Act plaintiff need not prove possession within a period of 12 years in addition to the title, as was the case under Article 141 of Limitation Act, 1908. When suit is based on title, unless defendant establishes that title of plaintiff has been barred by adverse possession and limitation, plaintiff is entitled to get a decree for recovery of possession. It is for the defendant to prove that title of plaintiff is barred by adverse possession as he has been in possession of the property for more than the requisite period and that too adverse to the real owner. It is for the defendant to establish that he had the animus to possess it as against the real owner. Unfortunately, first appellate court did not consider this aspect and did not consider the evidence which was appreciated by the trial court. Trial court found that when DW1 was examined, no claim by adverse possession as such was raised and though DW2 was examined his evidence

was found unreliable. First appellate court did not accept the evidence of DW2, which was rejected by the trial court. First appellate court also did not hold that appreciation of evidence by the trial court was improper or irregular. First appellate court also did not discuss the evidence of DW1 and enter a finding that his evidence establish that title of appellants is barred by adverse possession. On going through the evidence of DW1, I do not find any reason which enables first appellate court to interfere with the appreciation of evidence by trial court. Evidence only establish that respondents have been claiming that they have been in possession of plaint B schedule property including the disputed portion of item No.3 of plaint A schedule property. There is no evidence to prove that they have been in possession of the disputed portion, with the animus to possess it as against appellants or their predecessor. In such circumstances, first appellate court should not have been interfered with the decree granted by trial court. On the facts and circumstances of the case, first appellate court should not have interfered with the fixation of boundary and demarcation of the property by the trial court based on Ext.C1(b) plan.

5. Decree and judgment passed by District court,

Kollam is set aside and decree and judgment passed by Munsiff court in O.S.179 of 1985 is restored.

Appeal is allowed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.265 OF 1994

28th June 2007

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